United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1382

IN THE

UNITED STATES COURT OF APPEALS

For the Second Circuit

B P/S

No. 1382-76

UNITED STATES OF AMERICA,

Appellee,

v.

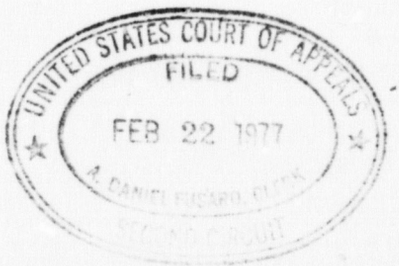
DUANE HARRIS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT.

BRIEF OF THE DEFENDANT-APPELLANT,

DUANE HARRIS.



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PRELIMINARY STATEMENT

This appeal is from the jury conviction on May 12, 1976 of Duane Harris of Counts One and Sixteen of a sixteen count indictment against the defendant Harris and others, docket No. 75-73, United States District Court for the District of Vermont, Judge Albert W. Coffrin, presiding. Specifically, this appeal is from orders of Judge Coffrin denying the defendant Harris' motions for judgment of acquittal at the close of the Government's case, the close of the evidence and after verdict made on May 11, 1976, May 11, 1976 and August 3, 1976 respectively and also from the admission of and failure to strike certain testimony with respect to the defendant Harris' being a part of an organization.

ISSUES FOR REVIEW

1. Did the District Court err in denying the Defendant's Motions for Judgment of Acquittal at the close of the Government's Evidence, at the close of Evidence and after Verdict?

2. Did the District Court err in admitting and refusing to strike certain testimony with respect to the defendant Harris' being a part of the organization?

STATEMENT OF THE CASE

By indictment dated October 9, 1975, the defendant Duane Harris and others, specifically Jay Leavitt, Wayne Holden, Norman Holden and Bruce Garland were charged with various drug related offenses. This indictment contained sixteen counts of which three counts indicted the defendant, Duane Harris. Counts 1 and 14 charged Duane Harris and others with unlawfully and knowingly distributing and possessing with intent to distribute a Schedule II controlled substance, to wit, amphetamine in violation of 21 U.S.C. §841 and 18 U.S.C. §2. Count 16 charged the defendant Duane Harris and others with conspiracy to commit various violations of the drug laws of the United States.

By Superseding Indictment dated October 23, 1976, the defendants were charged with the same offenses. The only change in the Superseding Indictment was the addition of a date in Count 16 (the conspiracy Count).

All defendants entered pleas of not guilty to all Counts and the trial of the defendant Jay Leavitt was severed from that of the other defendants who were tried together.

On April 5, 1976 trial by jury of the defendants Wayne Holden, Norman Holden, Duane Harris and Bruce Garland commenced and trial continued until April 8, 1976, at which time a mistrial was declared.

On May 4, 1976 a new trial commenced during the course of which certain evidence given by Special Agent Harold Anderson of the Drug Enforcement Administration with respect to a statement by the defendant Wayne Holden that the defendant Duane Harris was part of the organization was admitted and a later motion to strike was denied. During the trial Counts 11, 12 and 13, which did not involve the defendant Harris, were dismissed on motion of the Government.

At that trial the defendant Harris moved for judgment of acquittal at the close of the Government's evidence and at the close of evidence, which motions were denied.

None of the defendants testified and the defendants Wayne Holden and Bruce Garland presented no evidence. The defendant Norman Holden called one witness on an issue not relevant to this appeal. The defendant Harris called only one witness, his mother, who testified to rebut certain statements which officers had testified Harris made after his arrest.

The jury returned verdicts of guilty against the defendant Harris on Counts 1 and 16 and a verdict of not guilty on Count 14.

The defendant Garland was acquitted of the two Counts upon which he was charged. The defendant Wayne Holden was found guilty of all Counts (12 of them) of which he was charged. The defendant Norman Holden was found guilty of 3 Counts and not

guilty of two Counts.

After verdict, the defendant Harris moved for judgment of acquittal and in the alternative for a new trial, which motion was denied.

The defendant Harris, by Order filed August 3, 1976, was sentenced to imprisonment for a period of two years as to each Count with a special parole term of two years; the sentences to run concurrently.

Notice of appeal was filed by the defendant Duane Harris on August 3, 1976 and the defendant has been free on bail pending this appeal.

STATEMENT OF FACTS

On June 5, 1975, Agent Harold Anderson of the Drug Enforcement Administration of the Department of Justice working in an undercover capacity was in the Discotheque Bar in Brattleboro, Vermont at approximately 8:00 P.M. (Tr. p. 22). His purpose at that time was to meet with Wayne and Norman Holden, which meeting had been arranged through a "co-operating individual" who later was shown to be one David Patenaude (Tr. p. 23). He observed Wayne Holden, Norman Holden and Duane Harris seated at a table in the far corner of the bar (Tr. pp. 22 and 23). Prior

to that time, he had never met Wayne or Norman Holden (Tr. pp. 24 and 25). He had met Duane Harris before and was therefore concerned that he might be recognized as a Government Agent (Tr. p. 29).

Wayne Holden and the "co-operating individual" or "informer" approached Anderson and the three of them (Wayne Holden, Anderson and the informer) sat alone at a table at which time Anderson was introduced to Wayne Holden as "Bob" by the informer (Tr. pp. 29 and 30). At that time, they discussed Wayne Holden's acquaintance with a chemist (who later turned out to be the defendant Jay Leavitt) and proposed deliveries of P2P by Anderson to Wayne Holden, the chemist's manufacture of amphetamine from the P2P and return deliveries of a portion of the product by Anderson to Wayne Holden (Tr. p. 30). During this conversation Duane Harris was seated at a table at the opposite end of the bar in a corner approximately 25 to 30 feet away (Tr. pp. 31 and 32).

When testifying to the above events, Agent Anderson was asked the following question and gave the following answer (Tr. p. 32).

"Q. What if anything did you say about the presence of other people there that evening?

"A. I expressed to Mr. Wayne Holden I was upset that other people were present; that I was not interested

in meeting a lot of various individuals and he assured me that one of the individuals was his brother who was part of the organization and could be trusted; that the other individual (who was the defendant Duane Harris) was also a friend, was also part of the organization and could be trusted; that one of the reasons for his brother being there was that he had to rely on his brother for transportation as his right to operate was suspended."

Wayne Holden and Agent Anderson then discussed future meetings to carry out the plan and gave Agent Anderson a telephone number where he could be reached (Tr. pp. 33 and 34). At the time this number was given only Wayne Holden was present (Tr. pp. 36 and 37).

Wayne Holden and Agent Anderson then went outside the bar (Tr. p. 38) and Anderson delivered the P2P to Wayne Holden (Tr. p. 40) and they discussed future contacts (Tr. p. 41).

During this entire meeting, the defendant Harris had no conversations with Agent Anderson or Wayne Holden and in fact was over in a corner playing pool with others some 25 to 30 feet away and did not go outside with Agent Anderson and Wayne Holden when the delivery of P2P was made (Tr. pp. 290-291). He was present only in the sense that he was physically present in the same bar.

Between that date (June 5) and June 13th, Anderson had several telephone conversations with Wayne Holden concerning the completion of the manufacture of the amphetamine and its eventual delivery to Anderson (Tr. pp. 43-45). During this period, Agent Anderson had no contacts with Duane Harris (Tr. pp. 292-293). In addition, there was no evidence of the defendant Harris' involvement in any way during this period of time.

On June 13th at about 9:00 P.M., Agent Anderson placed a telephone call to Wayne Holden at the number that he had been given. At that time an individual who identified himself as Duane Harris answered. Agent Anderson testified as follows to that conversation and a second one that same evening (Tr. pp. 293-296):

"Q. On June 13, you had contact with him or perhaps two, is that right?

"A. That is correct.

"Q. And they were telephone calls, were they not?

"A. That is correct.

"Q. And they were telephone calls that were placed by you to the Newfane number that had been given you in the bar, is that right?

"A. That is correct.

"Q. And the purpose of those calls from your point of view, your purpose, was to talk to Wayne Holden, was

it not?

"A. That is correct.

"Q. But Wayne Holden didn't answer the phone, is that correct?

"A. That is also correct.

"Q. Duane Harris answered the phone, is that correct?

"A. That is correct."

* * *

"Q. Isn't it true that the gist or the substance of that first call that evening was merely that Wayne was not there and he would be back later?

"A. No, sir, I recall there was more to the conversation than that.

"Q. You asked for Wayne Holden, did you not?

"A. That is correct.

"Q. And you were told he wasn't there, is that correct"

"A. That is correct.

"Q. And there was some further conversation?

"A. That is correct.

"Q. What did that concern?

"A. I believe during the conversation I made an inquiry if Wayne had returned with the speed yet; if I

recall correctly I was told no but that Wayne wanted to meet with me on the following evening at the Discotheque Bar in Brattleboro to deliver the speed.

"Q. You initiated the conversation with respect to the subject of speed, is that right?

"A. I believe that is correct, yes.

"Q. And Mr. Harris told you Wayne wanted to meet with you the next night at the Discotheque?

"A. That is correct.

"Q. You placed another call that same evening, did you not?

"A. That is correct.

"Q. And again the purpose of that call was to reach Wayne Holden, was it not?

"A. That is correct.

"Q. And you didn't get him.

"A. That is also correct.

"Q. You were told he wasn't there?

"A. That is correct.

"Q. And the person you spoke with that evening was also Duane Harris?

"A. That is correct."

As to that second conversation of June 13, Anderson testified as follows (Tr. pp. 46-48):

"Q. What was the subject of the conversation on that occasion?

"A. At that particular time he related that Wayne Holden had not as yet returned. We then entered into a discussion. I told him I was very displeased at the way things were materializing, that the delivery of amphetamine back to me was being delayed and I felt either the chemist was very inexperienced or something to the effect that the Holdens were unreliable in this particular transaction."

* * *

"Q. What if anything did Mr. Harris say after you finished that statement you just made?

"A. Mr. Harris stated to me that the chemist was not inexperienced. He had been acquainted with the chemist for a longer period of time than what the Holdens had and that he had initially introduced the Holdens to the chemist.

"Q. What, if anything, did Mr. Harris say concerning the confidence of the chemist in the Holdens?

"A. I believe at that time Mr. Harris stated the chemist also had some reservations or doubts or something to that effect, concerning the Holdens' reliability.

"Q. Did you thereafter, make a statement about

meeting with the chemist?

"A. Yes, at that particular time I asked Mr. Harris, or asked Mr. Harris if it would be possible for me to meet with the chemist or perhaps eliminate going through this difficulty. He indicated he would speak to the chemist and see if a meeting could be arranged.

"Q. What arrangements, if any, were made for future contact?

"A. I believe at that particular time I told Mr. Harris I would telephone some time during the course of the weekend to speak with Wayne Holden."

Thereafter on June 15, Anderson again called Wayne Holden and between them (Holden and Anderson) they arranged a meeting to take place on June 16 at the MacDonald's parking lot for the purpose of delivery by Wayne Holden to Anderson of the amphetamine (Tr. pp. 49-51). On that date and at that place the delivery by Wayne Holden to Anderson did in fact take place (Tr. p. 56).

It is significant to note that it is this delivery on June 16 at the MacDonald's parking lot which gave rise to the conviction of the defendant Harris on Count I of the Indictment as distributing and possessing with intent to distribute.

It is even more significant that at no time did the Government prove or attempt to prove that the defendant Harris was present or anywhere in the vicinity on this occasion, and

in fact the evidence was clear and uncontroverted that the defendant Harris was not present or in any way took part in this possession or distribution. In addition, there was no evidence of Duane Harris' involvement in any way between June 13 and June 16.

Specifically, as to this delivery, the evidence was as follows (Tr. p. 298):

"Q. And certainly Duane Harris was not present?

"A. Not to my knowledge.

"Q. And on June 16th, excuse me, June 16 - yes, you never saw or had any knowledge, did you of Duane Harris possessing any controlled substance?

"A. No sir."

Except for the above quoted evidence with respect to the two telephone conversations of June 13 and the evidence with respect to being physically present at the bar or June 5, there was no evidence whatsoever that Duane Harris did any act that in any way aided or abetted in the possession or distribution of which he was convicted under Count I or furthermore, that he constructively possessed a controlled substance as alleged in that Count.

It is not necessary to recite in detail the events between June 16 and September 12. It is sufficient to state that during that period of time, there was voluminous evidence

with respect to various telephone conversations, surveillance, deliveries of P2P to Wayne Holden and deliveries by Wayne Holden to Agent Anderson of amphetamine, all involving other defendants, but in no way relating to the defendant Harris. In short, between June 13 and September 12 (almost 3 months), Duane Harris exits the scene. The only exception to this is that at one point, Agent Anderson testified that on July 17, he called Wayne Holden; that Duane Harris answered and gave him a number at which Wayne Holden could be reached (Tr. pp. 115-116). On another occasion he testified that his next contact with Duane Harris after the June 16 delivery by Wayne Holden, was on September 12 (Tr. p 298).

In any event, the evidence as to the September 12 contact was as follows (Tr. pp. 298-299):

"Q. And the nature of that contact was a telephone call?

"A. That is correct.

"Q. Telephone call made by you to the same number in Newfane, that was given to you at the bar?

"A. That is also correct.

"Q. And the purpose of that telephone call, was for you to reach Wayne Holden, is that correct?

"A. That is correct.

"Q. And Duane Harris answered the 'phone?

"A. That is correct.

"Q. And tell us the gist of that conversation; I know you testified to it, but I wish you would do it once more.

"A. Certainly. I believe at that time, I asked to speak with Wayne, was informed that Wayne was not residing at that location at that time; I believe he was staying it was put, on the Acton Hill, and if I recall correctly, Mr. Harris would try to get a message to Mr. Wayne Holden that I had called.

"Q. That was about it?

"A. I believe that was just about the context of the entire conversation, yes.

"Q. Duane Harris said he would try to get a message to him that you had called, to Wayne, that you had called?

"A. I believe that is correct, yes.

"Q. And you also asked him to have him get in touch with you at the Hartford number?

"A. I believe I might have said to have him contact me or call me, yes.

"Q. And he didn't do that did he - Wayne Holden did not call you; you had to go reach him again, didn't you?

"A. I'm not sure, I recall exactly how the next

contact was made.

"Q. Wasn't it several days later when you called Wayne Holden?

"A. That is correct.

"Q. So that would indicate to you would it not perhaps the message hadn't been delivered?

"A. That's a possibility, yes."

The next appearance of Duane Harris in the course of events is on September 28. At that time there was a telephone conversation between Norman Holden and Agent Anderson in which Duane Harris' name was mentioned. The testimony was (Tr. p. 301):

"Q. (By Mr. Grussing) To get right to the heart of it, Agent Anderson, you were told at that point were you not that Duane Harris didn't know his "a" from a hole in the ground, isn't that right?

"A. That is correct.

"Q. Does that indicate to you, he is part of the organization?

"A. I have no way of knowing."

Thereafter, Duane Harris does not appear on the scene until the early hours of October 1, at which time he was arrested at his home in East Jamaica, Vermont (Tr. p. 603) while sleeping on the couch (Tr. p. 604). His home was located some 40 or 50 minutes from Brattleboro (Tr. p. 607) where earlier that

evening, the defendant Wayne Holden had been arrested in the parking lot of the Discotheque Bar after delivery to Agent Anderson of a quantity of amphetamine (Tr. pp. 178-179) and other defendants were arrested at other places and times that evening.

In Count 14, the defendant Harris was also charged with possession with intent to distribute and distributing in relation to that delivery mentioned immediately above, again on a theory of aiding and abetting, but was acquitted by the jury. It was clear that, on that occasion, just as on the January 5th occasion, Harris was not present nor did he in fact possess a controlled substance.

After the defendant Harris' arrest and while being transported to the State Police Barracks in Brattleboro, the Government offered certain evidence as to statements made by him. These were to the effect (1) that it was a good thing they (the police) came that night because he was going to Mexico (Tr. pp. 605 and 636); (2) that Wayne Holden had spoken to him of not having seen any "fedish" around (Tr. pp. 606, 618 and 637); and (3) that he hadn't made any money out of this (Tr. pp. 606 and 638).

There was further, evidence from his mother that in fact Harris had intended to go to Mexico and California for a vacation with his family, that he was prevented from going because of his arrest and that in fact his family did do so (Tr. pp. 696-697).

Agent Anderson testified that during the course of this entire operation, which covered a period of 4 or 5 months, he had approximately 37 contacts either by telephone, physically or in some manner with all of the defendants. The extent of those with respect to Duane Harris is best shown by the following testimony (Tr. p. 304):

> "Q. (By Mr. Grussing) Isn't it true, Agent Anderson, at no time, from June 5th until October 1st, did Duane Harris ever take any affirmative action to seek you?
>
> "A. That is correct.
>
> "Q. And the only contact that you had with him, only conversations you had with him were when he answered the 'phone when you called the number in Newfane?
>
> "A. That is correct."

That number was 802-365-7628 (Tr. p. 34) and was subscribed to not by Harris or any of his family, but to Louetta Holden, mother of the defendants Norman and Wayne Holden (Tr. pp. 548-9).

ARGUMENT

I. The District Court erred in Denying the Defendant Harris' Motion for Judgment of Acquittal at the Close of the Government's case and at the close of the Evidence and After Verdict.

Count I charged the defendant Harris with possession and distribution of a controlled substance on June 15, 1975. There was no evidence whatsoever that Harris ever actually or constructively possessed or distributed such a substance. The Government's case with respect to that charge was purely on an aiding and abetting theory (Tr. p. 652). In addition, the Government relied solely on the telephone conversations of June 13 between Agent Anderson and Harris, the substance of which are set forth in the Statement of Facts. When arguing in opposition to the defendant Harris' motion for acquittal, the following appears:

> "The Court: Are you relying then on the telephone conversation of June 13 to indicate aiding and abetting as far as the Count in which Duane Harris is named?
>
> "Mr. O'Neill: Yes, your Honor, with respect to that particular Count." (Tr. p.653)

Therefore, the issue here may be narrowed in the factual context of this case to whether or not, standing alone, the acts

of answering a telephone and engaging in a conversation with respect to acquaintance with a co-defendant and indicating awareness of a planned delivery is sufficient evidence to allow a jury to conclude that Harris was guilty beyond a reasonable doubt of aiding and abetting in that delivery.

The test which a Court must apply in ruling on a motion for judgment of acquittal is well settled. The evidence viewed in the light most favorable to the Government, whether direct or circumstantial, must show beyond a reasonable doubt the guilt of the defendant or to put it another way, if that evidence when so viewed by the trial judge leads him to conclude that the jury would necessarily have to have a reasonable doubt, he must grant the motion. Holland v. United States, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1955), United States v. James, 510 F. 2d 546 at 552 (C.C.A. 5th 1975).

To be found guilty as an aider and abettor, the defendant Harris must be shown to have participated in the possession and distribution as something he wished to bring about and must have actively sought to make it succeed. Merely being a knowing spectator is insufficient. United States v. Martinez, 479 F. 2d 824 (C.C.A. 1st 1973). United States v. Garguilo, 310 F. 2d 249, 254 (C.C.A. 2nd 1962). United States v. Peoni, 100 F. 2d 401 (C.C.A. 2nd 1938). United States v. Terrell, 474 F. 2d 872, 875 (C.C.A. 2nd 1973). Of course, to meet that burden of reasonable

doubt, the Government must show more than a scintilla of evidence; it must produce evidence which if believed, affords a substantial basis in fact from which the defendant's desire to bring about and active seeking of success can be inferred. United States v. Roberts, 465 F. 2d 1373 (C.C.A. 6th 1972); United States v. Martin, 375 F. 2d 956 (C.C.A. 6th 1967).

As the Supreme Court said in Nye & Nisson v. United States, 336 U.S. 613, 619, 69 S. Ct. 766, 93 L. Ed. 919 (1949), quoting from Judge Learned Hand in United States v. Peoni, 100 F. 2d 401, 402 (C.C.A. 2nd 1938):

> "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed."

See also United States v. Johnson, 513 F. 2d 819, 823 (C.C.A. 2nd 1975).

This would seem to require three things, namely association, participation and action. It is submitted that here not only all three were not proven, but that none of these three elements were proven. The Government did prove by the two telephone conversations that Harris was acquainted with Wayne Holden, but mere acquaintance has never been held to be sufficient. United States v. Cirillo, 499 F. 2d 872, 885 (C.C.A. 2nd 1974).

As to the second requirement, namely participation, search as one may, no evidence can be found that Harris was a participant in any manner in the delivery of June 16, nor a lookout, chauffeur, intermediary, never had the amphetamine or the raw material in his possession and there was no evidence that he even passed on the message to call Anderson as requested by Anderson. In fact the evidence was to the contrary, namely that Anderson had to call Holden to set up the delivery.

As to participation, the same is true. Certainly, a fair inference to be drawn from the two telephone conversations of June 13th between Anderson and Harris was that Harris knew what was going on and was inclined to be helpful. However, that is as far as the proof did go. There was absolutely no evidence that Harris, other than engaging in the two calls, expended any efforts to make the venture succeed.

In United States v. Garguilo, supra, this Court reviewed the evidence against the defendant therein Machia and concluded that if that evidence passed the test, it did so only by a "hair's breadth" (at page 254). The evidence there was that that defendant was in fact present during the actual illegal activities and their planning and certainly was aware of it. Compared to the evidence as to Harris in this case, it is submitted that the evidence fell below the line of sufficiency to meet the above tests and in fact was below that line by considerably more than

a "hair's breadth" and that therefore, the motions for judgment of acquittal should have been granted.

With respect to the conspiracy Count (#16), much the same argument is valid. The elements that the Government must prove beyond a reasonable doubt are familiar and well settled. The Government must show (1) an agreement or plan to violate laws of the United States, (2) that the defendant knew of the plan, (3) that he adopted the plan as his own, (4) that he had a stake in its outcome and (5) that he made an affirmative attempt to further its success. United States v. Johnson, supra, at 823; United States v. Cirillo, supra at 883; United States v. Cianchetti, 315 F. 2d 584, 588 (C.C.A. 2nd 1963); United States v. Falcone, 109 F. 2d 579, 581 (C.C.A. 2nd 1940).

Taking these in order, the evidence leaves little doubt of the existence of an agreement to violate the laws of the United States. There is no question that Agent Anderson, Wayne Holden and Jay Leavitt, and to a lesser extent, Norman Holden formed a plan to supply the raw material for manufacture of amphetamine, for its manufacture and thereafter its distribution. Further, there was sufficient evidence through the telephone conversations of June 13 and the post arrest statements of Harris that he knew of the plan.

The third element, i.e. adoption of the plan as his own, stands differently. There is no evidence that might show Harris

did so. The Government relied heavily on two bits of proof to show such an adoption. First, the hearsay declaration of Wayne Holden to Agent Anderson with respect to Harris "being a part of the organization" and second, his post arrest statement with respect to getting "involved". Assuming arguendo that the trial court correctly allowed that statement (the organization one) to be considered by the jury, that statement was made at a time before the plan had been formed and the conclusion that might be drawn from it that Harris adopted the plan was amply negated by the following: his complete lack of later participation, a similar statement that he didn't know his "a" from a hole in the ground, that he had no stake in its outcome and got nothing out of it, and was not a party to the formation of the plan.

As to the statement after arrest about being "involved", a careful reading of that testimony shows that Harris never in fact made that statement and that it was made by the arresting officer and not responded to by Harris. To quote (Tr. p. 638):

> "Q. Was there a conversation about Duane Harris being involved in this entire matter?
>
> "A. Yes, he made the statement he hadn't made any money in all of this and I told him - my retort was I thought he was stupid for getting involved and taking the heat for the Holden brothers, if in fact he hadn't made anything on it.

"Q. So those were your statements not his?

"A. Yes."

The next element, namely "a stake in its outcome", is wholly without proof. Very little can be said more than that, search as one may, throughout the evidence, one cannot find any direct or circumstantial evidence from which one might reasonably infer that the success of the illegal acts of the other defendants would benefit Harris. As already pointed out, there was direct evidence that he did not get anything out of it. That statement was made by Harris as a spontaneous one after being awoken from sleep in the early morning hours, arrested and being transported to the police barracks. As such, it should have been considered highly probative of the lack of sufficiency of the evidence as to this element.

Finally, as to whether or not Harris made any affirmative attempt to further the success of the plan, again, the evidence is wholly lacking from which an affirmative answer might be reasonably inferred. At the risk of being repetitive, search as one may through the detailed testimony of multitudinous telephone calls, meetings, helicopter surveillance, and deliveries Harris enters the scene only as being in the bar the same evening the plan was formulated and engaging in four telephone conversations with Agent Anderson when he was calling to reach Wayne Holden. Of those calls, two (July 17 and September 12) were

merely to answer and to say Wayne Holden wasn't there. The other two can best be described as indicating he, Harris, knew what was going on. However, the evidence does not go the next step as required by the law and show he did anything affirmative and in fact indicates the opposite, i.e. that he did nothing even to the extent of relaying messages. The evidence shows that on each occasion Wayne Holden didn't return the call and Anderson had to contact him. Certainly, the inference is clear that the message was not even delivered.

As in the case of the aiding and abetting theory of Count I, a mere "knowledgeable spectator" cannot be found guilty of conspiracy. United States v. Martinez, supra; United States v. Sisca, 503, F. 2d 1337 (C.C.A. 2nd 1974); United States v. Johnson, supra, at 824; United States v. Cianchetti, supra, at 588. It is interesting to note that in all of the above cases in which the Court found the degree of proof lacking, the defendant not only had knowledge, but was present. Harris was never present when the crimes took place or the acts leading to them took place. If one compares the degree of participation of Harris with those of the defendants in United States v. Cianchetti, supra, or in United States v. Steinberg, 525 F. 2d 1126 (C.C.A. 2nd 1975) wherein this Court concluded the degree of proof was lacking, one must come to the inescapable conclusion that Harris' participation was of a lesser degree.

For the reasons stated above, it is submitted the District Court erred in denying and failing to grant the defendant Harris' motion for judgment of acquittal.

II. The District Court erred in admitting and refusing to strike certain evidence with respect to the defendant Harris' being part of the organization

At the trial a question was asked of and an answer given by Agent Anderson on direct examination which related to a conversation between Anderson and co-defendant Wayne Holden on June 5th at the discotheque bar in Brattleboro, Vermont. Harris was not a party to the conversation and was present only to the extent that he was some 25 to 30 feet away at another table (Tr. p. 291):

> "Q. I expressed to Wayne Holden I was upset that other people were present, that I was not interested in meeting a lot of other individuals and he assured me that one of the individuals was his brother who was part of the organization and could be trusted; that the other individual was also a friend was also a part of the organization and could be trusted * * *"

There was no question that the "other individual" referred to in the answer was Harris.

That question was not objected to and no immediate motion

to strike was made by counsel for Harris. The reasons for that were several. First, the question itself was not objectionable as it asked only what the witness said, not what Wayne Holden said. That portion of the answer dealing with the organization was clearly not responsive and as such should have been stricken. That was not requested at that time because all the Court need do is strike that portion of the answer and the Government would then have asked the question "What was his reply?" and it was clear to counsel that the objection would be overruled.

To understand why this was clear to counsel, a little background is necessary. As indicated in the docket entries included in the Joint Appendix, there had been an earlier trial of this case before the same Judge which resulted in a mistrial. At that trial and the trial from which this appeal results, Court and Counsel had agreed that objection by one defendant would be treated as an objection by all. At the earlier trial, Counsel for Norman Holden (the brother referred to in the answer) had objected to a question with respect to the same reply of Wayne Holden to Anderson's concerns about other people being present. At that time, the Court overruled that objection and allowed the same answer.

All of what occurred at that earlier trial is not before this Court, but that this occurred and that objection by one was to be considered as objection by all is confirmed in the transcript

of this trial below.

At one point, counsel for the defendant Garland moved for a limiting instruction with respect to a similar statement of Wayne Holden testified to by Anderson (Tr. pp. 69-70). The defendant Harris joined in that request (Tr. p. 71) and after some discussion, the Court stated (Tr. p. 71):

> "Now while I have counsel here, the ground rules, if one counsel objects we will consider the objection as to all counsel for all parties unless counsel specifically states that they don't want to be included as far as that objection is concerned. This will save time I hope."

Thereafter, the Government sought to elicit certain similar statements made by Wayne Holden again with respect to the defendant Garland (Tr. p. 101). Garland's counsel objected (Tr. p. 102), and after lengthy discussions (Tr. p. 102-109) the following occurred:

> "Mr. Grussing: For the record, on behalf of the defendant Duane Harris, I think we have the same problem with respect to the testimony that was offered as to the meeting in the discotheque bar on June 5 where Agent Anderson testified that Wayne Holden said something to the effect that Norman Holden and Duane Harris were part of the group or the organization. We did not object

at that time because Mr. John made that objection at the earlier trial and the objection was overruled, but just for the record, we anticipate at a later time also making perhaps a motion to strike that testimony, and just so counsel haven't been considered being diligent I would bring this to the Court's attention at this time.

"The Court: The Court remembers that particular testimony and you handle it on behalf of your client in whatever way you feel it is appropriate. Are you ready to proceed Mr. O'Neill?"

Later, the following occurred on redirect examination of Anderson by the Government (Tr. p. 356):

"Q. (By Mr. O'Neill) Without naming names, how would you describe the class or types of persons you were attempting to gather evidence with respect to?

"A. The scope of the investigation was to include anyone we could identify that was involved in the illegal manufacture, transportation of drugs, or procurement of chemicals in this particular amphetamine organization.

"(Mr. Grussing): I would like the Court to strike that last part of that answer; this particular organization, first of all he hasn't told us what he is referring to and secondly, there is no evidence that there is any organization."

The Court indicated it would grant that request (Tr. p. 357) and after discussions of other matters the Court stated (Tr. p. 362):

> "The answer to the final question asked by the United States Attorney ended with a discription of the individuals being an organization and I am going to strike that part of the answer. Any group of individuals have not been identified in this case as being part of any organization. Is that satisfactory Mr. Grussing?
>
> "Mr. Grussing: Yes, and they should disregard it.
>
> "The Court: Yes. Disregard the use of the word 'organization'."

Later, the defendant Harris moved to strike the testimony of the June 5th conversation with respect to Harris being part of an organization (Tr. p. 672) which was denied (Tr. p. 676).

We therefore have a rather strange situation. At one point in trial after almost all of the Government's substantive evidence had been received, the Court granted a motion to strike testimony indicating an "organization" existed, the Court at that time specifically stating there was no proof of the existence of such an organization. At another point, the Court refuses to strike such testimony which had been given at the outset of the Government's case.

At best, there appears to be inconsistent rulings by the

trial Court and it would also appear that the Court was confused with respect to this matter.

The rule seems well settled that before permitting the jury to consider hearsay declarations of one alleged co-conspirator as evidence against his alleged co-conspirator, the trial Court must find by a fair preponderance of the non-hearsay evidence that the latter was a party to the conspiracy. Glasser v. United States, 315 U.S. 60, 74, 62 S. Ct. 457, 86 L. Ed. 680 (1942); United States v. Cirillo, supra, at p. 883; United States v. Calarco, 424 F. 2d 657, 660 (C.C.A. 2nd 1970); United States v. Steinberg, supra, at 1134.

At the time the evidence of the June 5 conversation took place the record was bare as to non-hearsay evidence of Harris' participation. It later improved only by the evidence with respect to his knowledge of what was going on and of his acquaintance with the chemist which came out of the June 13th telephone calls. It is submitted that this did not establish by a fair preponderance of non-hearsay evidence a sufficient foundation for the denial of the motion to strike. At least at one point the Court below appears to have agreed in instructing the jury that no organization had been shown. Yet, with respect to other testimony as to the organization, it allowed it to stand for the consideration of the jury. This we submit was error.

The Court indicated it would grant that request (Tr. p 357) and after discussions of other matters the Court stated (Tr. p. 362):

> "The answer to the final question asked by the United States Attorney ended with a discription of the individuals being an organization and I am going to strike that part of the answer. Any group of individuals have not be identified in this case as being part of any organization. Is that satisfactory Mr. Grussing?
>
> "Mr. Grussing: Yes. Disregard the use of the word 'organization'."

CONCLUSION

For the reasons stated herein, the judgment of conviction of the defendant Harris should be reversed with directions to enter judgments of acquittal or in the alternative to order a new trial.

Respectfully submitted,

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February 15, 1977

CERTIFICATE OF SERVICE

This is to certify that on the 16th day of February 1977, I made service of the Brief for the Appellant and the Joint Appendix upon the United States of America, Appellee, by mailing two copies thereof to George W. F. Cook, United States Attorney for the District of Vermont, P. O. Box 10, Rutland, Vermont 05701.

Robert Grussing III